THE

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REPORTS OF MASSACHUSETTS.

It was announced in our last, that a new volume of reports from the pen of a new reporter, was in preparation for the press. The occasion seems a proper one to take a brief retrospect of the changes which have taken place in this department of our jurisprudence.

We do this, however, rather in the way of preserving memorials of the past, than with an expectation of giving pleasure to our general readers. So little interest is, ordinarily, felt in what is called the literature of the law, or the history of jurisprudence, that they generally find but few readers. Yet, even for these few, we feel justified in devoting a few pages to reminisences connected with the early reports of our supreme court. It is to lawyers that lawyers must look for whatever of immortality there is to be earned in the profession, and cheerfully would we add the little information that we have gathered, to the history of our court at a period that now dates among the things which have wellnigh passed away.

It is but a little more than forty years since the first volume of our reports was published, and yet, of all whose names are among the actors in the causes there reported, *seven* only, we believe, remain; court, reporter, all have gone, and, with the exception of a few who may have earned a name in other fields of usefulness, scarce a memorial of them remains beyond the

reach of fading local tradition, or the few and meagre memoranda which are found in this and other volumes of our judicial reports.

Indeed, we have to come down to the twelfth volume of our reports before we find the name of a single judge of our supreme court who now holds a seat upon that bench. Two only survive who were members of the court before that period. But of the learning, the eloquence, and the exhausting labors which have characterized the bench and the bar of Massachusetts, ever since she assumed the rank of an independent commonwealth, how little does the world know. The public have reaped the benefit of the watchfulness with which they have guarded the public peace and labored for the protection of private rights, while the people at large have been all but unconscious of the ceaseless toil and labor by which this has been accomplished. Efforts, which in the halls of congress might have carried the meed of wide applause, have often been expended in courts of justice, to be wholly forgotten as soon as made, or recorded only by the simple statement in a volume of reports, that those who made them were of counsel for the plaintiff or defendant, in some case whose interest was, at best, confined to few beyond the parties litigant.

The history of the business of reporting in Massachusetts is necessarily brief. Other states took the lead of her in this respect. Connecticut, as early as 1788, had produced one volume, and New York, Pennsylvania, and we believe, some of the other states, had done the same before any movement had been made here.

The reason of this may be found in the manner in which our court was then constituted, and the very unsatisfactory and defective mode of settling questions of law then in use. Not only did it require a quorum of the judges of the supreme court to conduct jury trials, but the questions of law that arose in these trials were generally determined upon the spot, without advisement, and a reference to authority was rarely made by either counsel or court. To obviate the delays that arose from this mode of administering justice, there were at one time such a number of judges created for that court, that two quorums were thereby constituted to act in different parts of the commonwealth at the same time, and to settle questions of law

in the last resort, without conference or concurrence, and often without coincidence of opinion.

The change by which our present admirable system of Nisi Prius and law terms was at length established was in progress, when in March, 1803, the act for the appointment of a reporter was passed.

Under that law, five, including the present incumbent, have held the office. Two have died. One is, as we trust, enjoying in retirement the fruits of many years of laborious, but honorable service. Another has been called to expound that law, whose principles he had done so much to illustrate as an able writer and an accomplished reporter. The places heretofore held by the present incumbent and his promotion from the bench of the common pleas, (for, with the salary which has heretofore been paid, any translation from that bench must have been a promotion, so far as an adequate and honorable compensation is concerned,) give the public a right to expect that the office will not lose the high character it had attained under the administration of his predecessors.

The first of these was the Hon. Ephraim Williams. Like most lawyers, however eminent, his life had little of incident to give interest to a biography.

He was born in Deerfield, November 19th, 1760. His ancestor, Robert Williams, emigrated from Norwich, England, in 1638, and settled in Roxbury, in New England, where he became the founder of many of the extensive and respectable families of that name. His father was Dr. Thomas Williams, who removed from Newton to Deerfield, in 1739, and was highly distinguished, not only in his profession, but in the civil and military offices which he held under the crown. He was a brother of the distinguished Col. Ephraim Williams, the founder of Williams College, who fell in battle at Lake George, in the war with the French, in 1755, and from whom the subject of this article took his name.

Dr. Williams left a large family of children, and died when Ephraim was fifteen years of age. Though so young, he was the oldest of his father's children by a second marriage, and was, by the condition in which they were left, obliged to take the lead in the management of the family. This deprived him of an opportunity for acquiring a classical education, but he

gave such decided indications of possessing talents of a high order, that his friends urged his devoting himself to the study of the law. He yielded to their suggestions, and, at the age of twenty-two or three, entered the office of the late Judge Sedgwick, in Stockbridge. The courteous manners and sound learning of Judge Sedgwick rendered him a fit guide and companion for Mr. Williams, and upon his commencing business a copartnership was formed between them, which was continued as long as they remained together at the bar.

He resided at Stockbridge till 1801 or 2, and during that time represented that town several years in the legislature, where he acquired a high reputation and a leading influence. He did not, however, allow his duties as a legislator, to interfere with his progress and success in his profession, and, for the time he remained at the bar, few of his cotemporaries surpassed him in those powers and attainments which distinguish the able, independent, and upright lawyer. No man could excel him in fidelity and unbending integrity.

At the time above mentioned, in the midst of a most successful career at the law, he suddenly abandoned the practice, returned to Deerfield, and never again accepted a professional fee, although his opinion as a lawyer was highly regarded and frequently sought.

In 1803, he was selected to fill the place of reporter, and commenced its duties at the September term, in Berkshire, in 1804. In October of the following year he published the first volume of "Massachusetts Reports," and soon after resigned the office. He continued to reside at Deerfield, and being a bachelor, was a member of the family of a brother, who occupied the old mansion-house in which he was born. In 1815, however, he was married to a Miss Trowbridge, very much his junior, and their only son is the president of Washington, now called Trinity College, in Hartford, (Conn.) He continued to reside in Deerfield until his death, December 27, 1835, at the age of 75.

After his resignation of the office of reporter, he held no public station, with the exception of two years, for one of which he reluctantly consented to serve as a senator, and the other as a member of the executive council.

Mr. Williams was no ordinary man. Had he been more will-

ing to act in public life, he would have been better known, and more generally appreciated. Those who knew him most intimately, speak in the highest terms of the blandness of his manners, the ardor of his feelings, and his admirable powers of conversation. It abounded with wit and anecdote, while it was full of happy illustration and instructive suggestion.

Nature intended him for a gentleman, and education and habit helped to finish the design. In his person he was tall, being full six feet in height, and of fine manly proportions, while a dignified courtesy marked him as belonging to "the old school," which unfortunately is so fast passing away. His dress was as characteristic as his manners, and never, to the day of his death, would he be persuaded to substitute the modern pantaloon for that somewhat rare relic of a dignified and courtly age, breeches and long stockings.

But it was of him as a reporter that we intended to speak more particularly when we began. And here it is impossible that justice should be done him without recurring to the state of the court at that time. It has already been alluded to. One or two citations from the volume itself would serve as the best illustration of the manner in which judicial opinions were then formed and pronounced. On p. 93, it is stated that "Sedgwick, J. *charged the* jury, and delivered as the unanimous opinion of the court, that, &c." p. 136, "The court consulted a short time *on the bench*, when Sedgwick *stated to the jury* that the court, upon the best consideration they could give the case were *inclined* to the opinion that, &c." But even this statement was not to be relied on, for it seems, in this very case the reporter was afterwards informed "from the best authority," that Thacher, J. did not concur with the rest of the court in the opinion they had expressed. In another case, p. 487, "the court took time to consider, and, *next day*, they said they were clearly and unanimously of opinion, &c." Indeed, we have heard an older member of the profession state that he had heard one of the judges who was then upon the bench, commence a charge to the jury by expressly admitting that he did not pretend to know what the law of the case was, but he would tell them what he thought of the facts. Besides this, the business and object of reporting was not generally understood. If the idea which seems to have been entertained by

Mr. Williams and his successor, in the early part of his duty, were now carried out, few lawyers could purchase, and fewer be able to read the volumes which it would require. If to the elaborate treatises into which so many opinions of courts, in modern days, expand, were to be added the arguments of counsel at length, to be often furnished by themselves, the world would not hold the books. In Mr. Tyng's preface to his first volume, he says, "the kindness of many gentlemen of the bar, in furnishing the reporter with briefs of their points and authorities, has greatly supplied the defects of his own minutes. *In some cases, indeed, as the reports will too plainly show, he has derived assistance of another kind, from gentlemen who have done justice to their arguments by clothing them in their own language.*" It is enough to make one nervous to think of bringing all the arguments of counsel before our courts in these days "clothed in their own language," and sold at the rate of $3·50 per volume!

The volume which Mr. Williams published, fell under the keen and searching criticism of a very distinguished lawyer of a neighboring state, published in a literary periodical of the day, and either from chagrin at such a review, or from a disrelish for the employment which required him to travel into every county of the state, including the then district of Maine, Mr. Williams retired from the office and was succeeded by Mr. Tyng.

We have already spoken of Mr. Williams's sudden abandonment of the profession he had chosen and which he was so well calculated to adorn. The account given of this by a writer in the July number of the American Jurist, 1837, is this: "We have also understood that his resignation and retirement from the bar were occasioned by an insult, real or supposed, received from the late Judge Dana, who then presided in the supreme judicial court."

How this may have been we know not; but with the ardent temperament, keen sensitiveness, and high toned, honorable feelings of Mr. Williams, we can easily conceive that he would not willingly subject himself to the hazard, a second time, of an indignity which he might not repel and could not, with propriety, rebuke as it deserved. The bench, in this respect, have an advantage over the bar, which a generous mind ought to

scorn to abuse. To a lawyer of just and honorable feelings, scarce anything can inflict a deeper or more painful wound than rudeness and insult from the court. Neither the place nor the occasion, in such a case, justifies meeting such insult in a way that a gentleman has a right to repel rudeness, and the only alternative is ordinarily to bear the indignity in silence, or abandon a field where courtesy and respect fail to command the same in return. Fortunately, however, the time has gone by in our own country, and we believe in England, when superciliousness on the part of the court toward the bar is thought essential to dignity, and when learning, however preëminent, may palliate or excuse petulance and rude manners in a judge.

If the space which this article has already occupied admitted, anecdotes might easily be recounted, illustrative of the manners of some of the judges soon after the revolution. So far, however, from this being the case, we are compelled to omit, till some future occasion, the notice we had intended to give of Mr. Williams's successor and his reports, which so justly merit something more than a passing commendation, by the eminent place they have ever held among the books of authority in our own and other courts in the Union.

Recent American Decisions.

Supreme Court of the United States, at Washington, Feb. 7, 1849.

SMITH *v.* TURNER. — NORRIS *v.* CITY OF BOSTON.[1]

The power of congress to regulate commerce is exclusive.

Statutes of the several states which impose a tax upon passengers arriving from abroad, are unconstitutional, although states may pass *quarantine* laws, and impose penalties and exact payment of expenses, such laws not being regulations of commerce.

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[1] EDITOR'S NOTE. The great importance of this decision seemed to require that some report should be presented in the present number. The report given above is compiled from several sources; among others resort has been had to the full abstracts contained in the Washington correspondence of the Daily Atlas (Boston) and Evening Post (New York.) It undoubtedly contains some errors, but it was impossible to make it more correct at this time.

THESE were two cases from New York and Massachusetts, and the question arose in each upon the validity of the "alien passenger" tax as imposed by their respective statutes. In the first case the commissioner of emigration sued the owners of a vessel arriving at the port of New York in 1844, for the amount due on the whole number of passengers in the ship, at one dollar per head. This was in conformity to a law of the state of New York. The defendant's demurrer set forth that this law was a "regulation of commerce," and therefore unconstitutional. But the supreme court and court of errors overruled the demurrer and gave judgment against the defendant. The case came before the supreme court upon a writ of error. The other case (*Norris* v. *City of Boston*,) was an action of assumpsit for money had and received, to recover thirty-eight dollars, the amount paid by the plaintiff to Calvin Bailey, the regularly-appointed boarding officer, (appointed by the city council of Boston, agreeably to stat. 1837, ch. 238,) and the ordinance of the city. This case was argued at the court of common pleas, October term, 1839, upon an agreed statement of facts, where it was *held* by WILLIAMS, C. J. that the statute (ut sup.) was constitutional, and the plaintiff became nonsuit. To this ruling he alleged exceptions, and the case was argued before the supreme court of Massachusetts, at the March term, 1841, and an opinion (4 Met. 282,) delivered at the next March term, sustaining the constitutionality of the law.[1] This case was likewise carried up on a writ of error.

In the New York case, *Ogden* and *J. Prescott Hall*, for the plaintiffs in error, *Willis Hall* and *John Van Buren* for the defendants in error.

In the Massachusetts case, *Webster* and *Choate*, for the plaintiffs in error, *Davis* and *Ashmun*, for the defendants in error.

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[1] We subjoin § 3 of this act. "No alien passengers, other than those spoken of in the preceding section, (i. e. such lunatics, idiots, paupers, &c., for whom bonds are required,) shall be permitted to land until the master, owner, consignee, or agent of such vessel, shall pay to the regularly appointed boarding officer, the sum of two dollars for each passenger so landing, and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct, for the support of foreign paupers." Stat. 1837, ch. 238.

McLean, J. delivered the opinion of the court.

There are two questions: 1. Is the power of congress to regulate commerce an exclusive power? 2. Is the statute of New York a regulation of commerce? It is admitted that the states have not parted with any power, except by express grant in the constitution, or by necessary implication. All powers which concern our foreign relations belong to the federal government exclusively. A review of the opinions of judges in all the cases in which the question has arisen, leads to this result. There cannot be a concurrent power in two sovereignties to regulate the same subject. It would involve an absurdity, and produce inevitable collisions. The power, then, over commerce, is exclusively vested in congress.

Is the law of New York a regulation of commerce? The states may guard against the introduction of any thing which may affect the health or morals of their citizens; but they are limited to what may be absolutely necessary for that purpose. Commerce includes navigation and intercourse, as well as the exchange of commodities, and therefore includes the transportation of passengers. To encourage foreign emigration was part of the early policy of our government; and a large amount of tonnage has always been engaged in the carrying of passengers. Pilot laws are regulations of commerce, and the state laws have become the laws of congress by adoption. The act of congress expressly adopts them. They are not laws by force of any state power. A state may do many things which affect commerce, — though it may not regulate it. It may tax a ship belonging to a citizen; but it is then taxed as part of the general property of the state. The act of New York is called a health law. The funds collected are called hospital money. But it is difficult to see how it can be a health law. Part of the funds go to support institutions for juvenile offenders, and it might as well be applied to all the general purposes of the state. It might be increased so as to pay all expenses.

The decision in the case of *The New York* v. *Miln*, (11 Peters, S. C. R. 102,) is entirely consistent with these views. That case was decided upon the ground that the law only operated *within* the state of New York. It imposed no obstruction to commerce nor did it cause any delay.

The transportation of passengers is regulated by acts of con-

gress; and being a branch of commerce, the act of New York is a regulation of it, and therefore void. After passengers have left the ship and mingle with the citizens of the states, then they may be taxed. A tax like this destroys the uniformity which ought to exist throughout the Union. The municipal power of the states cannot prohibit the introduction of passengers, except to protect itself against disease. Congress has passed acts in aid of the state regulations of quarantine, and thus they have become regulations by congress itself.

If New York may thus tax passengers, citizens of the United States as well as foreigners, — then every other state may do the same, on every railroad and river throughout the Union. Perhaps nine-tenths of the passengers landed at New York pass through to other places. The police power cannot pass beyond its proper limits. In guarding the health of its citizens, it cannot authorize a tax which regulates commerce.

CATRON, J. read an opinion giving his reasons for concurring in the judgment. Among other things, he claimed that congress has, by its legislation, covered this entire subject, and referred to several acts in relation to the transportation of passengers; and that the act of New York was a violation of the 14th article of the treaty of 1796 with Great Britain.

The opinion of MCKINLEY, J. was read by CATRON, J. It concurred in declaring the laws void; but added an objection founded upon that article in the constitution, which relates to the importation or migration of persons into the country before the year 1808.

GRIER, J. concurred, but read no opinion.

WAYNE,[1] J. concurred entirely in the opinions given by CATRON, J. and MCKINLEY, J. but said it was not necessary

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[1] Mr. Justice Wayne is said to have made a curious statement in regard to the case of *New York* v. *Miln*, which had been so much relied on by the counsel for the defendants in error, and in which it had been decided that the tax on alien passengers was a health regulation, and not in conflict with the exclusive power of congress to regulate commerce. He wished to set the court *rectus in patria* in regard to that decision. It had never commanded the assent of a majority of the court. At that time the court consisted of only seven members. Three judges were in favor of asserting the exclusive power of congress for the regulation of commerce, and three were opposed to it. Justice Baldwin did not agree in the reasoning of either side. Justice Thompson was designated to write out an opinion for the court. He did so, but taking the ground that persons were not the subject of commerce, and that the act was merely a health regulation. The other judges would not adopt it, and Judge

to decide the question of the exclusive power of congress, although on that point he concurred with McLean, J. He stated eight propositions, substantially as follows:

(1.) The acts of New York and Massachusetts are unconstitutional and void, being regulations of commerce. (2.) States cannot tax commerce of the United States for support of police laws. (3.) Congress having by sundry acts regulated the admission of aliens, the acts in question are in violation of said acts of congress. (4.) The acts of New York and Massachusetts, imposing a tax or obligations on masters of vessels engaged in commerce, are void as being violations of the constitution and the acts of congress. (5.) The ninth section of the first article of the constitution concerning the importation and emigration of persons prior to the year 1808, relates to other persons, as well as slaves. (6.) The prohibition by the constitution of giving a preference to one part over another is also infringed. These taxes are a violation of the article which requires uniformity of taxation. (7.) The power of congress over commerce includes navigation and the rights of navigation in all its branches, and the transportation of passengers is one of its branches. (8.) States may pass quarantine laws, and impose penalties, and exact payment of expenses, and such laws are not regulations of commerce.

Taney, C. J., dissented. There is a difference between the cases of Massachusetts and New York. The law of the former state affects the passenger after the arrival within its jurisdiction and before landing. It is a part of the pauper law of the state, and intended to create a fund for the support of foreign

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Thompson read it in court as his own opinion. Judge Barbour was then selected to write out the opinion of the court, which he did. It was read the day after the adjournment, and in presence of all the members of the court, but Judge Baldwin. When he examined it he at once dissented from it, and without his assent it had not the assent of a majority of the court. Judge Baldwin immediately went in pursuit of Judge Barbour to have a correction made. He had just left his lodgings for the steamer, which was to convey him home. Judge Baldwin, therefore, had no remedy for misrepresentation of his opinion and vote upon the bench — for he had agreed to the opinion, before it was written — but to express his dissent in his book, called views of the constitution. The effect of this series of errors is, that an irrepealable law is passed by the supreme court by a vote of three to four. It has gone forth to the country as judicial law; on the faith of it suits are brought, and great expense is incurred in litigating them. At the eleventh hour of the eleventh year of its duration, however, one of the judges who voted against the law, brings to light the mode in which it was passed, and announces that this court will no longer enforce it.

paupers. Its character cannot be misunderstood. If the passenger chooses to remain on board, and not to land, nothing is to be paid. It is a tax upon the passenger. If the plaintiff recovers, he will recover the money which he has paid for others.

The first inquiry, therefore, is, whether the constitution has given to the general government a power to compel the state of Massachusetts to permit any person of any description, paupers or otherwise, to come into its borders? Congress has never attempted to exercise any such power. This question was decided, in my opinion, in several cases. The state may remove persons who are hostile to its peace or morals, and if it may expel, it may keep them out. The state alone has this power. This was so decided in *Groves* v. *Slaughter*, (15 Peters, 297,) in Mississippi, in relation to the introduction of slaves. The United States have no power over the question who shall, or shall not, reside in a state. The state alone may exercise this power according to its discretion. If the general government can control this power in any respect, then the real and substantial power is in congress and not in the states. But the state has, in my judgment, the sole control of this whole subject. Now, Massachusetts deems the introduction of pauperism and disease a dangerous incident to the introduction of aliens, and the history of the case shows that a fearful amount of increase of expense has been thrown upon her. She, then, having the right to reject and refuse aliens entirely, may annex such conditions as seem proper to protect the interests of her own citizens, and extend her humane provisions to this class of unfortunate strangers. Her government is charged with the duty of protecting her own citizens, and the acts in question are a proper exercise of her discretion as to the manner of doing it. The constitution makes no distinction between different classes of aliens. The states may make such distinctions as they please. This court cannot supervise or regulate this exercise of discretion. It would be utterly incapable of ascertaining who might perhaps become paupers, or diseased, who rich and who poor. This must be done by local authorities, in the mode directed by state laws. I can, therefore, see no ground for the exercise of this power by the general government. It is a power of self-protection reserved by the states.

The question as to the exclusive power of congress over commerce, was fully discussed in the "License cases"; and I then expressed the opinion, and five judges held, that the power of congress was not exclusive. The opinions then expressed are referred to, as fully disposing of the question.

But there has been no treaty or act of congress produced which gives to all aliens a right to land in the states unconditionally. It would startle the states, if congress is now to be held as having the whole power over the introduction of aliens into states. It would throw into hands of ship-masters power to bring and land just whom they pleased; for congress has made no provision for any distinction between felons, paupers, or diseased persons. All whom the cupidity of the ship-master may lead him to bring, must be landed and mingled with the citizens of the states, at his will, if the states may not regulate and control it. There is no conflict between any treaty or law of congress and these acts of the state of Massachusetts. It imposes no tonnage duty, or tax upon commerce, but annexes a condition to the landing of passengers, and regulates the terms upon which they may be admitted to enjoy the protection of the state.

If these laws are void, then the emancipated blacks of the West Indies, or free blacks from any quarter, have the free and uncontrolled right to enter the southern states at their will, hire houses, and remain there without restraint by state laws. It can hardly be supposed that any rule by which such a consequence would follow was ever expected to be established by those who framed the constitution; and the states, in forming the constitution, never granted away their indisputable rights over the subject.

I shall not enter into an inquiry concerning the authenticity of the reported decision in the case of *New York* v. *Miln*. I have never regarded it as questionable. It was drawn up after the declaration of opinions by all the judges in a conference upon the case.

The opinion was read in open court without objection being heard, and we have never seen any dissent but that of Mr. Justice Story The transportation of passengers is not a branch of commerce. The tax under the New York act was imposed not only to guard against the evils and burthens of foreign pauper-

ism, but to aid in the reformation of juvenile delinquents. But notwithstanding this latter application of the money, the constitutionality of the statute is defensible on other grounds.

DANIELL, J., dissented, and expressed the greatest alarm at the consequences which would result from thus breaking down some of the most important rights of the several states, and declared that it was his solemn duty to put on record his most emphatic protest. The power of congress over commerce is not exclusive, and the exaction of money from alien passengers, as a condition of their entrance into the states, is not a regulation of commerce, but is a tax which the states may justly assess upon every person within their limits and jurisdiction. Passengers are not *imports*, in the meaning of the constitution, and no clause can be found in that instrument by which the states have granted to the federal government any power over the subjects of pauperism, or the admission of foreign immigrants into the states.

NELSON, J., dissented, but did not give an opinion at length.

WOODBURY, J., dissented. The laws are to be sustained on three grounds. (1.) The enactment of such laws is a proper exercise of the police power of the states. (2.) It belonged to the states, as part of the sovereign power, to regulate the admission of aliens. (3.) It was part of the taxing power of the states. Whatever may be thought of the expediency of the particular details of the law, I have no doubt of the clear and unquestionable right of the states to enact such a law. The tax seems to be a legitimate part of the pauper regulations, and is not too large or unreasonable, considering the great amount of expense which foreign pauperism throws upon the citizens of the states. Paupers may be entirely excluded, and the supreme court has so repeatedly declared; and if this may be done, certainly conditions may be annexed to their admission. States may, indeed, impose any conditions upon any foreigners, paupers or others, as conditions upon which they may come into their limits, or exclude them entirely. This is an essential part of sovereign power, and has never been granted away by the states to the federal government. This has been exercised in one form or another, by more than half the states in the Union, and particularly in the slave states. Nor is there in the constitution any prohibition upon the states

against doing what Massachusetts has done. There are some prohibitions upon the states, but this is not among them. It is not a tax on imports. A passenger is not an import, nor an article of commerce. Who is the importer, if a passenger is an import? He comes of his own volition, and is therefore his own importer, if he is imported at all. The power of congress over commerce is not exclusive.

Judgment reversed in each case.

Circuit Superior Court of Law and Chancery, Petersburg, Virginia, November, 1848.

BANK OF VIRGINIA *v.* STAINBACK.

A notarial protest set forth that the notary "went to the counting-house of T. W. C., upon whom the said bill is drawn, and *speaking to a clerk*, exhibited unto him the said bill, and demanded acceptance thereof; whereunto he answered, that the same could not be accepted. *Held*, that the evidence of dishonor was sufficient if the clerk were proved to have been instructed by the drawee to refuse acceptance. Whether the clerk's authority could be inferred from any local usage, *quære*.

The case of *Musson* v. *Lake*, (4 Howard, S. C. R. 262,) doubted.

Where notice of protest, which might have been sent by a packet-ship from England to America, was kept back until the sailing of the next Cunard steamer, so that it did not reach this country as soon as it would have done if sent by the packet-ship, the court instructed the jury, that the notice was forwarded in due time, if they believed from the evidence that "the Cunard line of steamers was the regularly established mail line between Great Britain and the United States, and was the regular and ordinary mode of communication, &c." and that the notice was sent by the first steamer leaving after the protest.

It being the usage of London to leave a bill with the drawee for twenty-four hours, without regard to the posts, the holder of a bill, who receives it on the third of the month, in time to acknowledge its receipt by steamer of the fourth, is *not* bound to present it on the same day, though he might, by so doing, have forwarded notice of protest on the fourth.

THIS was an action of assumpsit against the defendant as indorser of a bill of exchange, drawn in Petersburg, by F. C. Stainback, on T. W. Clagett, of London, for £1000, and protested for non-acceptance. The bill was remitted for collection to Call, Martin, & Co., of London, by whom it was received on the 3d of April, 1843, and who advised the plaintiffs of the fact, by letter of that date. This letter was brought out by the steamer "Brittannia," which sailed from Liverpool for Bos-

ton, on the 4th of April. The bill was protested for non-acceptance on the 5th of April. The letter of Call, Martin, & Co. giving the plaintiffs notice of the dishonor, and enclosing the protest, bore date the 17th of April, and was brought out by the steamer "Hibernia," which left Liverpool for Boston, on the 19th of April. This letter reached the plaintiffs on the 8th of May; and on the same day, they gave notice to the defendant.

The protest set forth that the notary "went to the counting-house of T. W. Clagett, Esq., upon whom the said bill is drawn, and speaking to a clerk, exhibited unto him the said bill and demanded acceptance thereof; whereunto he answered that the same could not be accepted."

The counsel for the defendant objected to the admissibility of the protest, and also to the admissibility of any other evidence to prove the presentment, demand, and refusal: but it was argued that the evidence on both sides should be produced, the right being reserved to the defendant to object after the whole should be heard.

The plaintiffs proved by the depositions of sundry notaries, bankers, and merchants of the city of London, that it is the usage of that city to leave a bill for acceptance on one day, and to call for it on the next, leaving it with the drawee in the meantime; that if the bill be returned unaccepted to the holder, he puts it into the hands of a notary, who again presents it at the place of business of the drawee for acceptance, and in case of refusal by the drawee, or by a clerk, or other person employed therein, extends the protest for non-acceptance; and that a refusal by a clerk to accept under such circumstances is a sufficient dishonor, by the custom of merchants and bankers, in London, to charge the previous parties.

The plaintiffs proved by T. W. Clagett, that sundry bills drawn upon him by F. C. Stainback, were presented to him in March and April, 1843, of all which he instructed his clerk to refuse acceptance to the notary, when he should call for an answer; and that he believed the bill on which this action was brought was one of the bills so presented.

The plaintiffs also proved that in August, 1841, a contract was entered into between the British government and Samuel Cunard, and others, for the transportation of the mails between

Great Britain and the United States, by means of a line of steamers, plying between Boston and Liverpool; that in April, 1843, the steamers of said line sailed each way twice a month, the days of sailing from Liverpool being the 4th and 19th days of each month; that it has been the habit of the London post office, since the contract with Cunard, to forward all letters addressed to the United States by that line, unless specially directed to be forwarded by other ships, notwithstanding that in the interval between the delivery of any letter into the post office and the sailing of a steamer of that line, one or more other vessels, either steam or sailing, may sail from Great Britain for the United States; that merchants in Richmond and Petersburg generally, if not invariably, receive their letters from Great Britain by that line, and did so in the spring of 1843, and previously; and that a steamer sailing from Great Britain in the month of April, 1843, might reasonably have been expected to make the voyage to the United States in from ten to twenty days less than a sailing packet.

The plaintiffs also proved by bankers and merchants of the city of London, that it is now, and was in April, 1843, the general usage of bankers and merchants in that city, to forward notices of protest to parties in the United States, by the steamers of the Cunard line, and that such notices are considered sufficient, if dispatched by the first mail made up in London, after the dishonor of the bill, for conveyance to the United States by the steamers of that line. Among the witnesses examined as to this point, were George Carr Glyn, of the house of Glyn, Halifax, Mills & Co.; John Pickersgill, of the house of John Pickersgill & Son; Joshua Bates, of the house of Baring, Brothers & Co.; Samuel Phillips, of the house of Samuel Phillips & Co.; D. B. Chapman, of the house of Overend, Gurney & Co.; and Christopher Pearce, of the house of Fletcher, Alexander & Co. Some of the witnesses said that since the establishment of the "Washington steamers" in 1847, between New York and Southampton, it had been the usage of some houses to send a duplicate protest by that line, for greater certainty.

The defendant proved that in April, 1843, there were five regular lines of sailing packets running between New York and Liverpool, the regular days of sailing from each port being

the first, seventh, thirteenth, nineteenth, and twenty-fifth days of each month; that at the same time there were two regular lines of sailing packets running between New York and London, which sailed from London on the seventh, seventeenth, and twenty-seventh days of each month, and from Portsmouth on the first, tenth, and twentieth days of each month; that between the fifth and nineteenth days of April, 1843, there sailed from Liverpool for New York, the "*England*" and the "*Rochester*" on the ninth of April, and the "*Garrick*" on the fifteenth of April, all belonging to regular lines; and that the "England" reached New York on the thirtieth of April; that it was the usage of all the regular sailing packets in April, 1843, and still is, to carry letter bags which are made up for that purpose at the post office; that it is, and was, in April, 1843, the usage of the post office in London to issue daily, a sheet called a "packet list" announcing the days of sailing from London and Liverpool, of packets for the United States and other foreign countries.

The defendant read in evidence the deposition of James G. King, of the late house of Prime, Ward & King, of New York, who proved that he had been, for upwards of twenty years, a banker in New York, dealing extensively in foreign exchange; that in April, 1843, it was the usage of merchants and bankers in New York to send notices of dishonor to persons residing in England, by the first regular packet to England using sails or steam, or both, and that no usage required or authorized the notice to be withheld for Cunard's line, if any packet of a regular line sailed in the interval; that he had resided several years in Liverpool, and had done business from London with this country, and therefore considered himself acquainted with the usage of merchants and bankers in London; and that in April, 1843, the usage of London was the same as that of New York, in respect to sending notices, namely, to send the notice by the first regular packet of whatever kind.

The defendant also read the deposition of James B. Murray, who proved that he had been a merchant in New York since the year 1810, and had had large transactions in foreign exchange between the United States and Great Britain; that he resided in London in 1839, 1840, 1841, and 1843, and had transactions in exchange and otherwise to a very large amount,

which caused him to be familiar with the usages of that city.

The evidence of this witness corresponded with that of Mr. King, as to the usage both of New York and London, in sending notices of dishonor to and from England and the United States. And in relation to the usage in London he said, that in April, 1843, it was, and for a long time previous had been, the usage of bankers and merchants in London to deposit in the Post-office on the next day after the dishonor of a bill, a notice directed to a party in the United States, to be forwarded by the next mail.

The evidence on both sides being closed, the counsel for the defendant objected to the admissibility of the protest, because it did not state a presentment to the drawee in person, or to his authorized agent, and that everything stated in the protest might be true, and yet the bill not have been dishonored by the person on whom it was drawn; and he cited Chitty on Bills, 301, 306, 400. *Nelson* v. *Fothrall*, (7 Leigh, 211.) And he insisted that the protest must stand or fall by itself, and could not be helped out by extrinsic evidence of any fact not stated in it, and that the true rule was, that the protest must state facts sufficient, if true, to make out a legal dishonor. In this he relied on Chitty on Bills, 489, and especially on *Musson* v. *Lake*, (4 Howard S. C. R. 262.) The doctrine of *Musson* v. *Lake* was, that if any essential fact be omitted in the protest it cannot be supplied by parol evidence; and the protest, in that case, stating a demand of payment, without stating that the notary had the bill with him at the time of making demand, it was held, that this fact could not be proved *aliunde*. And it was held, that the protest being thus defective, was not even admissible in evidence. So it was argued, if the protest had not alleged any presentment at all, it would not have been competent to the plaintiffs to prove any excuse for the failure to make presentment, no such excuse being stated in the protest; that if the protest had stated a presentment to John Smith, being otherwise in the usual form, it would not have been competent to prove that Clagett was dead, and that John Smith was his Executor, or that Clagett was out of the country, and that John Smith was his agent, with authority to refuse acceptance; and so where the protest stated presentment to a

clerk, which was *primâ facie* not sufficient, it was not competent to prove that the clerk, who is not stated to be the agent of the drawee to refuse acceptance, was in fact authorized to do so, and thus to eke out an insufficient protest; and that if this might be done, there was no limit to the principle, and any other essential fact, omitted in the protest, might equally be supplied. He insisted that it could not be presumed that the clerk was the agent of the drawee for this purpose, for the evidence showed that the authority to refuse acceptance was not incident to the duties of the clerk, but was derived from the express instructions of the principal in each particular case; and as such instructions are not given to all the clerks in the house, and the notary could not know to which they were given, it could not be presumed that the clerk to whom the bill was shown was the one to whom the instructions had in fact been given. And it did not appear, except by the parol evidence, which was inadmissible, that this bill had been shown to the drawee, upon which fact the authority of the clerk to refuse acceptance essentially depended.

It was insisted that nothing done by the holder, before delivery of the bill to the notary, could be referred to to make out the dishonor, since the "law makes the notary the agent of the holder for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser," (4 Howard S. C. R. 275,) except giving notice. Hence the rule that the notarial certificate is the only legal evidence of dishonor; and as the notary can only certify his own acts, it was clear that any thing necessary to be done to establish the dishonor, must be done by the notary.

It was insisted that it was not sufficient or admissible to show that the presentment in this case was according to the usage in London, where the bill was payable, for this being a question as to the measure of diligence necessary to charge the indorser, who became liable by indorsing the bill in Virginia, the law of Virginia alone governed the case; that the distinction was this, that the facts which constitute legal diligence, the things to be done and certified by the notary, are to be ascertained by the law of Virginia, but that the time and manner of certifying these facts are to be ascertained by the law of London. In which he cited *Musson* v. *Lake*, (4 Howard 262, 278;) Story on Bills, § 176; *Aymar* v. *Sheldon*, (12 Wend. 442.)

The counsel for the plaintiffs cited *Nelson* v. *Fothrall*, (7 Leigh, 211,) to show that the clerk might be presumed to have had authority from the drawee to refuse acceptance, and especially in this case, under the evidence as to the usage of London; and also to show that parol evidence was admissible to prove the authority. They argued that the doctrine maintained by the counsel for the defendant would lead to infinite inconvenience and embarrassment, and that the principles advanced by the majority of the court in *Musson* v. *Lake*, (4 Howard, 262,) were in conflict with *Nelson* v. *Fothrall*, and could not be sustained. They also argued that the protest in this case was sufficient, because it conformed to the usage of London, and that it might be construed and explained by reference to the usage of presenting and protesting bills in that city; and that when thus explained, it stated every fact essential to make out a dishonor of the bill.

The court refused to exclude the protest, and instructed the jury that it was sufficient evidence of a dishonor of the bill, if they believed from the evidence in the cause, that the clerk to whom the bill was presented by the notary, had been instructed by the drawee to refuse acceptance. The court was inclined to the opinion, that the authority of the clerk to refuse acceptance might fairly be presumed from the London usage, so that the protest, of itself "made full proof of one diligence," in the language of the court in *Musson* v. *Lake*. But the court doubted the soundness of the decision in that case, and thought that the principle, if carried out, would lead to great inconvenience.

In relation to the notice the defendant's counsel moved the court to instruct the jury as follows:

"If you believe that the bill on which this suit is founded was protested for non-acceptance on the fifth day of April, 1843; that the letter from the holder containing notice to the plaintiffs of the non-acceptance, was written on the 17th of April, and forwarded by the Cunard steamer of the 19th from Liverpool to Boston, that being the first steamer of that or any line that left England for the United States after the date of the protest; that during the interval between the 5th and 17th days of April, one or more regular sailing packets left London for New York, by which the holder of the bill might have for-

warded the notice, and that during the same interval one or more regular sailing packets left Liverpool for New York, the regular days of sailing of which were known in London, by which the holders of the bill might have forwarded the notice; that mails or letter bags were regularly made up at the London Post-office, for the regular sailing packets from that city, and also for those from Liverpool to New York; then the notice of dishonor was not despatched in due time, and you should find for the defendant. And that this is so, although you find that the Cunard line of steamers carried the mail between the United States and Great Britain under a contract with the British Government; that commercial letters from merchants in Great Britain to their correspondents in the United States, were usually forwarded by that line, and that the steamer of the 19th April might have been reasonably expected to arrive as soon as any of the sailing packets referred to, or sooner."

In support of his motion, the counsel insisted, that the notice should have been dispatched on the day of the dishonor, if any regular conveyance set out on that day, or, if not, by the next earliest conveyance, Chitty on Bills, 367, 505, 510; the diligence imposed by law on the holder of a protested bill, in giving notice of dishonor by mail, being diligence in *forwarding* the notice; that if notice be dispatched by the first regular conveyance, it is immaterial when it reaches the party, or whether it reaches him at all, Story on Bills, § 300, and that if the notice is not dispatched in proper time, it is insufficient, though it arrive as soon as it would have done if forwarded in time, or even sooner, *Brown & Sons* v. *Ferguson*, (4 Leigh, 37.) He said the law does not require that notice shall be sent by the most rapid conveyance, nor allow one regular conveyance to be pretermitted because another more rapid will leave on a subsequent day. And he put the actual case of a mail leaving Petersburg for Norfolk by land, on Tuesday, and another leaving Petersburg for the same place, by steamboat, on Wednesday, and supposed a bill dishonored in Petersburg on Monday. He said that a notice to be sent to Norfolk ought to be deposited in the post office in Petersburg, in time to go by the mail of Tuesday, and that the holder could not excuse his laches in waiting until Wednesday, on the ground that he expected the steamboat of Wednesday to arrive as soon as the stage of Tues-

day. And that still less could the laches of the holder be excused in this case, where he had done nothing for twelve days, and had pretermitted half a dozen regular conveyances in that interval. That the case might have been different if the holder had deposited the notice in due time in the post office, for then he would have used the requisite diligence, and any subsequent delay would have been chargeable to the regulations of the post office. And he said, that it was the duty of the holder to put a letter containing notice into the post office as soon as practicable after the protest, or on the next day after the protest, with a direction to forward it by the first mail or letter bag made up for the United States. The witness, Murray, proved that it was the duty of the holder, by London usage, to deposit the letter the next day; and no witness in the case said otherwise in direct terms. He insisted, however, that the usage of London as to the time and mode of sending notices to this country did not affect the case, which was to be governed by the law of Virginia, *Musson* v. *Lake*, *ut sup.*; and that if the law were not so, any usage of this sort, which was unknown to such persons as the witnesses King and Murray, was not so fixed and well understood as to be entitled to govern.

He said that the practice of merchants in sending commercial letters to the United States was not a fit criterion, for they regarded speed only, and always adopted the line that was quickest; that, by this test, the Cunard line would cease to be a proper conveyance for notices, if the next line established should be more rapid; that, by this test, the sailing packets are a proper conveyance *to* England, but not *from* England, as the evidence was, that merchants, even now, frequently write by the sailing packets going out. And he said that the holder was not justified in waiting for the Cunard steamer, because it was the mail steamer, by which all letters were sent by the post office, unless otherwise directed, for every regular packet carried a mail bag made up at the post office; that by this rule the holder might have pretermitted a steamer of the "Washington line," though carrying the mail under contract with the government of the United States, and that the principle which governed the sending of notices on land by the mail, did not apply to transmission across the Atlantic, when the days of starting are distant, and there are numerous well known reg-

ular and certain conveyances, and all carrying letter bags, leaving in the intervals. And he said that if the plaintiffs were right in this point, then in case of a bill protested in Havre, the holder might wait a month for the mail steamer for New York, which leaves but once a month, pretermitting the usual channels of communication through England, and also all the regular packets from Havre direct, no matter how many. And he insisted that the position maintained by the counsel for the plaintiffs amounted only to this, that the holder might wait for the mail steamer, provided it was the usual mode of sending letters, and provided, in the particular case, it might be reasonably expected to arrive as soon as any conveyance leaving in the interval, making every case depend upon a calculation of chances as to the time of arrival.

The counsel for the plaintiffs argued in reply, that the only question in relation to the notice was a question of fact, namely, whether the notice had been sent by the first regular conveyance for the transmission of letters of business from England to the United States; that it was clear from the evidence, that Cunard's line was such regular conveyance, having practically superseded all others for that purpose, as well as for the particular purpose of transmitting notices; that if the holder had put a letter into the London post office on the fifth of April, addressed to the plaintiffs at Petersburg, it would not have been forwarded until the sailing of the steamer of the nineteenth, which brought out the notice; and that the law does not require the holder to be diligent in depositing his letter in the post office, that it may lie there, but is satisfied if it is deposited in time to go by the mail of the day succeeding the dishonor, or by the next mail whenever it be, if there be none on that day. And they maintained that the holder was justified in preferring Cunard's line over all others, for the reason that it was the only line established by law for the transportation of the mails between Great Britain and the United States.

[These are only the main points of the argument, which were enforced at great length.]

The court refused to give the instruction prayed by the defendant's counsel, and instructed the jury, that the notice was forwarded in due time, if they believed from the evidence, that "the Cunard line of steamers was the regularly estab-

lished mail line between Great Britain and the United States, and was the regular and ordinary mode of communication generally used and adopted by merchants, bill brokers, and other men of business in Great Britain, as the channel of communication from that country to this," and that the notice was sent by the first steamer of that line which left Great Britain after the protest.

The counsel for the defendant further objected, that as the bill reached London on the third of April, in time for the holder to acknowledge its receipt by the steamer of the fourth of April, it was the duty of the holder to present it on the same day, so that notice might have been forwarded by the steamer of the fourth, for which he cited Beawes's Lex Merc. 418, pl. 17, Comyn Dig. *Merchant*, F. 6.

The counsel for the plaintiffs cited Chitty on bills, 279, (10th Am. Ed.) where it is said that the usage of London in all cases is to leave the bill with the drawee for twenty-four hours, without regard to the departure of the post, and observed that the London witnesses in this case stated the usage without the qualification mentioned by Beawes and Comyn.

The court overruled the objection.

The jury found a verdict for the plaintiffs.

David May, *Thomas Wallace*, *Thomas L. Gholson*, for the plaintiffs.

William T. Joynes, for the defendant.

Police Court, Boston.[1]

COMMONWEALTH, on complaint of Francis Tukey, *v.* JOSEPH G. RUSSELL AND AARON H. ALLEN.

What constitutes a dedication of a highway.

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[1] Several members of the profession have requested the publication of this opinion, that it might be put in a proper form for preservation. The opinion was delivered about a year ago, and has been printed once in the Daily Advertiser.

THE facts in the case appear in the opinion of the court, which was delivered by

ROGERS, J. This was a complaint for a violation of the fifteenth section of an ordinance passed August 22, 1833, "to prevent unlawful and injurious practices in the streets of the city." The provision charged to be violated is in these words: — "Be it further ordained, that if any person shall place, or cause to be placed, any trunk, bale, box, crate, cask, or any package, article, or thing whatsoever, on or over any part of any public street, lane, court or alley in this city, and suffer the same to remain there more than three hours," &c., "he shall forfeit and pay," &c.

The defendants keep a furniture warehouse, and have placed furniture in front of their warehouse, but they deny that the land upon which it was placed is any part of the street.

It is admitted by the defendants that Dock Square is a public street. It is admitted and proved, that a building formerly stood on the spot occupied by the defendants, which abutted on the street — that during the years 1820, 1821, and 1822, it was pulled down, and the present building was built, and set back from four to four and a half feet from the then existing line of the street; — that the fee in the land between the present building and the street was and still is in the owner of the building; — that this land was made level with the sidewalk, and laid down in brick uniformly with the sidewalk. It was proved, that no monument, mark, or any other apparent distinction between the part of the sidewalk covering this land and the other part of the sidewalk had ever existed. It was admitted that the public passed and repassed over the land, except so far as they were prevented by the articles placed upon it, and by the open cellar door of the building; and that furniture was placed and remained there, such and so long, as to constitute the offence charged, if the land was then part of the public street. Some other evidence was offered on both sides, which will be stated, as it comes up for consideration in the case.

It was held by the court in *Commonwealth* v. *Boston*, (16 Pick. R. 442,) that streets and lanes are synonymous with public ways or highways, and it is not disputed, that Dock Square is such a highway. Has anything been proved, which shows that the land in question has become by law part of the highway?

Land may become part of a highway in three ways. First, by being laid out by the mayor and aldermen in the manner provided by law for laying out highways. But this is not pretended in this case. Secondly, by immemorial usage or by prescription. *Odiorne* v. *Wade*, (5 Pick. 421;) *Stetson* v. *Faxon*, (19 Pick. 147.) Although the time of user required to make a highway of this kind may be less than formerly, the user in this case, which has not exceeded fifteen years, is too short. Thirdly, it may become part of a highway by dedication. We are then to determine in this case, whether removing a building back from the highway — making the land between the building and the highway level with the sidewalk — laying it down in brick like the remainder of the sidewalk — erecting no monument, making no mark, leaving no visible distinction between the land in question and the other part of the sidewalk, coupled with the user of it by the public for fifteen years in passing and repassing, is sufficient *prima facie* evidence of such a complete dedication, as will make it part of the highway.

If nothing more is necessary to make land a highway than proper acts on the part of the owner and a sufficient user by the public, such facts would be sufficient to prove a dedication. The elements of a dedication, so far as it is made by the owner, are an intention to dedicate, and some act, declaration, writing, or course of conduct expressive of such intention, and carrying it into action. *Commonwealth* v. *Newbury*, (2 Pick. R. 57, 1 Camp. R. 162, note.) It may be immediate, where the intention and the act, declaration or writing are sufficient. *Hobbs* v. *Lowell*, (19 Pick. R. 407;) *Woodyer* v. *Haddon*, (4 Taunt. R. 137.) But where it consists principally of a nonfeasance or sufferance, as where a permission is implied from the user of a road by the public, the time of user is a material ingredient. — Six or eight years have been held to be sufficient, and four years was in one case held to be insufficient. *Trustees of Rugby Charity* v. *Meriweather*, (11 East R. 375, note.)

Kent thinks twenty years necessary. It seems to us, on examination of all the cases, that there is not any fixed period of time, which is to be required in all cases; but that the user must be longer or shorter, in proportion as it constitutes a more or less material part of the evidence; that is, it may be shorter, where the presumption from it is corroborated by other facts. The

evidence in this case of fifteen years user by the public seems sufficient upon either principle.

But it has been proved, that during the whole of the time of the user by the public, the building was leased to tenants; and it was held in the case of *Wood* v. *Veal*, (5 B. & A. 154,) where there had been a user during a lease of ninety-nine years, that no dedication would be presumed against an owner of the fee, while the land was in the possession of tenants. But this rule does not apply, where the user has been proved to have actually come to the knowledge of the owner. *Duncombe* v. *Smith*, (Wellbeloved on Highways, 54,) or where there has been so frequent a change of tenants, as to warrant an inference, that the user came to his knowledge, and that he could have put an end to it, before he leased again. *Rex* v. *Barr*, (4 Camp. 16.) In this case there were three tenants within the fifteen years; but it is not necessary to decide the point on that ground, as the actual knowledge by the owner of the state of the land and sidewalk and of the user by the public was proved by sufficient evidence.

If, then, the evidence on the part of the prosecution proves *prima facie* a sufficient permission on the part of the owner, and a sufficient user on the part of the public, it only remains to be considered whether the dedication is complete without any acceptance on the part of the city, or whether any such acceptance is proved.

1. Is any act of acquiescence, adoption, or acceptance by the city necessary.

The English cases to which we have been referred, and others which we have seen upon this point, we will examine first.

The case of *The Trustees of the British Museum* v. *Fennis*, (5 C. & P. 460,) may have been cited to show the effect of rebutting testimony, but has no other bearing.

In the case of *Woodyer* v. *Hadden*, (5 Taunt. 125,) the way in question was held by three out of four of the court not to be a highway, and the case did not turn on the question of acceptance.

In *Sir Robert Lade* v. *Shepherd*, (Strange, 1004,) it was held, that if the road was a highway, the plaintiff, having a fee in the land, might recover for the trespass. If it had been a

common way, and not a highway, the case would have been still stronger. It would then have been a trespass, not only to have placed the end of a bridge upon the road, (which was the trespass in that case,) but even to have entered the road at that point. A common way can be entered only at the intended points of communication, but a highway anywhere.

These cases, therefore, are not in point.

In *Jarvis* v. *Dean*, (3 Bing. R. 446,) it was left to the jury to find whether the road was a highway or not, upon evidence of many years' use as a public thoroughfare, with the assent of the owners of the soil, and a new trial was refused. The jury were not instructed that any acceptance was necessary or unnecessary, nor was the question raised or apparently thought of.

In *Rex* v. *Lloyd*, (1 Camp. R. 260,) a circuitous passage had been made from one part of a street to another part of the same street by the owner of all the land through which the way was made. Until the interruption, which was the cause of action, "the passage way had been open as far back as could be remembered," and was lighted by the parish. It was held to be a highway. Ellenborough, C. J., in his opinion, "remarks" I think, "that if places are lighted by public bodies, this is strong evidence that the public have a right of way over them." This may express some indistinct idea of an adoption by the parish, and that it might make an important part of the evidence of a dedication; but not that it was essential to render the dedication complete.

The question of acceptance cannot be considered as fairly raised until the case of *Rex* v. *The Inhabitants of St. Benedict*, (4 B. & A. 447.) There the defendants laid out a private road under an act of parliament, and the road had been used by the public fifteen years.

Abbot, C. J. says, that it had not by the user become a highway by dedication, because the owner was forced to allow a qualified passage. But Bayley, J. put his decision, that it was not a highway, on the ground, that there was no acceptance by the parish. "I do not assent," says he, "that because there is a dedication of a road by the owner of the soil, and the parish use it, the parish is bound to repair. I think, there ought to be in addition to that, evidence of the acquiescence of the parish in that dedication. In the case of a parish, they have no

power to prevent the opening of a public road, or to obstruct the public use of it. It would be most unjust, if by the use of what was a private road, the burden of repairs could be removed from the persons to whom the use of the road was at first confined, and thrown upon the parish. Admitting that there was a dedication, I think, that in consequence of the want of some act of acquiescence on the part of the parish, they were not liable to repair." This is equivalent to saying that it was not a highway.

There have been three cases since this, which have some bearing on this question. In *Rex* v. *Mellor*, (1 Barn. & Adolph. 32,) there was a turnpike road made under an act of parliament, but not strictly according to it, on which a township did the repairs required by the act until the act expired. There was some evidence of user by the public afterwards. Littledale, J. remarks, "a road becomes public by reason of a dedication of the right of passage by the owner and an acceptance of the right by the parish or the public." Bayley, J. — The parishes could only be liable to repair by reason of their common law obligation, "as there was no adoption by the township of Oldham it was not liable to repair." Parke, J. says in effect, that if the repairs had been on a road voluntarily made and dedicated, it would show an adoption; but as it was, there may not be any ground for presuming an adoption by the public.

Rex v. *Inhabitants of Cumberworth*, (2 Barn. & Adolph. 108,) was a similar case, but half a mile of the road was never built. Tenterden, C. J. — "Besides, there was no act of acquiescence on the part of the defendants, and according to *Rex* v. *St. Benedict* and *Rex* v. *Mellor*, such an act was necessary, at all events, to make them liable. Littledale, J. — Besides, to make the district liable, some act of acquiescence should have been shown on their part." Taunton, J. — "To make the district liable there ought to have been an adoption by it." *Rex* v. *St. Benedict*. Patterson, J. prefers to decide on other grounds, but remarks, "there is some authority for this doctrine."

In both these cases, this was not the principal point on which the case was decided; there was not much evidence of user on the part of the public; and by some of the court the acts of adoption seem to have been taken to be like the user by the

travellers, evidence that it was a public road, rather than as a a particular acceptance by the parish necessary to bind it.

Rex v. *Inhabitants of Leake*, (5 Barn. & Adolph. 469, 2 Neville & Manning, 583,) was an indictment for not repairing a road made by user on a dyke built by trustees under act of parliament. Parke, J. — The absence of repairs by the parish is indeed a strong circumstance in point of evidence to prove that the road is not a public one — the fact of repair has a contrary effect. But the conduct of the parish in acquiescing or refusing an acquiescence is in my opinion immaterial in any other point of view. The judgment of Mr. Baron Bayley, in the case of *Rex* v. *St. Benedict*, was cited to the contrary; but I must say, that I cannot accede to the doctrine, nor am I aware that there is any authority for it. Littledale, J. — The adoption by a parish does not necessarily, as a matter of law, make a road public, nor does their refusal to adopt it, prevent its being so. — If the parish have repaired it, it raises a strong presumption, that it is a public highway. The adoption by the parish is no more than the use of it by the public. The parish are merely part of the public. Denman, C. J. — But I by no means think any act of adoption necessary to make a parish liable to repair a common road. I am of opinion, that if it is public, the parish is of common right bound to repair it.

Littledale and Parke have probably explained here, what they meant by their former opinions; and notwithstanding the three previous cases favor a contrary opinion, it at present seems that the law in England is, that no acceptance is necessary.

We have seen only one case in any of the other states, in which the question was considered, *Willoughby* v. *Jenks*, (20 Wend. R. 96,) which was an action of trespass by the tenant in fee for digging on a highway. He was an abuttor and offered evidence of a dedication of the road by the owner, and user by the public, to prove that it was a highway; relying on the presumption of law, that the fee to the middle of the road was in him, as evidence of his title. But the court remark, in giving their opinion on the principal question, (concerning jurisdiction,) that "he did not show, that it had been accepted as a public street." It seems, therefore, as far as this goes, that it would be holden in New York, that a dedication is not complete without acceptance.

In our own state, there is a dictum in *Hackley* v. *Hastings*, (2 Pick. R. 162,) that a highway could not be made by dedication. But in *Hobbs* v. *Lowell*, (19 Pick. 407,) the court remark upon this, "we do not consider, that this was a decision of any point in that case," and in the latter case, it was decided, that there may be in this state a highway by dedication.

But there is no decision upon the question whether acceptance or some act of acquiescence by the town is necessary to make a dedication complete. The cases of *Odiorne* v. *Wade*, (5 Pick. 421,) which settled that immemorial usage must be an uninterrupted usage, and *Stetson* v. *Faxon*, (19 Pick. 147,) where the question was, what would prove a discontinuance, and whether a private action would lie for an incumbrance, throw little or no light on the subject.

In the case of *Hobbs* v. *Lowell*, (19 Pick. 407,) it was held, that there was sufficient evidence of assent on the part of the towns of Lowell and Chelmsford; so there the question, what assent is necessary, did not arise, "the court gives no opinion upon them, and they must be considered as open for consideration, whenever they occur."

The case of *Valentine* v. *Boston*, (22 Pick. R. 75,) was an action for damages for laying out a highway over land, from which a house had been removed back, and which was left open to the street and had been travelled over for a century. The court held, that as the public had acquired a right of way over the land, it was no damage to the plaintiff to lay it out as a highway. This leaves everything open as before, without any authority by which we can be guided except the dictum in New York and the English dicta and decision, if they are applicable to our situation and circumstances.

We must then inquire, what weight is to be given to the English cases, and how far they ought to influence us in the decision of this question. This must depend upon the circumstances which make roads by dedication necessary or convenient in each country. Is the question the same in each? Whatever authority we may allow to English cases, they can influence us only so far as the questions are similar. In England, beside dedication and the immemorial usage, which furnishes a presumption of it, a road can be made only by act of parliament. A private act of parliament cannot be obtained without great

expense. Large fees must be paid to officers of parliament and counsel — the costs of a hearing before a committee are great. There is only one place of hearing for all the legislative business of England, Scotland, and Ireland, to which the parties and witnesses must be carried, however great the distance. There must be much delay; it must take its turn among the business of a great kingdom, and all must wait until then, and there may be several hearings at different times and sessions. The legislature of twenty-eight millions of people, and of their colonies in India and elsewhere, containing three times as many, is an inconvenient tribunal to determine about a few miles of road. The road has been made, and travelled, and needs repair; and the question is, whether the parish, by a mere non-feasance, shall force the parties to resort to such a tribunal to make it a highway and compel repairs. The hardship on the parish must be weighed against the hardship of resorting to such a remedy, besides the injury to the public from the deficiency of necessary highways, which would follow, if they could be made in no other way.

Here we have commissioners in every county, living there, and acquainted with localities and circumstances — a convenient tribunal, provided by the legislature expressly to determine, whether such a highway is necessary or convenient — whether it is worth the cost — to hear all parties — adjust conflicting interests — liquidate damages and impose terms; and all this may be done at a moderate expense and without much delay. If a highway cannot be made here by dedication, without the consent, expressed or implied, of the town, which is to repair, it only compels a resort to this cheap and easy method of doing justice to all. Upon this difference between the circumstances of the case here and in England, the court remark, in *Hobbs* v. *Lowell*, "It is manifest, however, that there is very little analogy between the character, powers, and duties of parishes in England, and those of towns in this commonwealth. Almost the only point of resemblance is, that they are respectively bound to repair all highways within their limits, where other provision is not made by law for the purpose. The great point of difference is, that in this commonwealth towns have the power, in a certain course of proceedings to lay out town-ways, which are in effect public highways within their limits. They

are also recognized as parties in all proceedings for establishing new highways, for the support of which they are to be responsible." Morton, J. (who dissented on the principal point in that case,) remarks upon "the danger of following the adjudications of the English courts in cases where the dissimilarity of the two countries requires their respective courts to diverge." In *Rex* v. *Leake*, which has probably settled the law in England, the court confine themselves to statements of assent to one doctrine or dissent from another, without giving the reasons of their conclusion; the little reasoning to be found is in the previous cases and on the opposite side. From all the consideration of the subject, it seems that the English authorities should have little influence in the decision of this case, and we must consider how it will stand under existing circumstances here.

An individual may lay out a road consulting only his own interest, and passengers may use it without any consideration. There is nothing to determine that any road is necessary or convenient, or what kind of road is wanted, or whether it is properly made or half made, or where it should begin or end, or what is the best route between the *termini*, or whether it will prevent the making of another necessary or more convenient road, or how many persons it may injure. In a city it may prevent building, or render it inconvenient or expensive, may injure the laying out of much valuable land, and may do good to no one. It may be the result only of accident or negligence; as where one leaves his ground open, and the public use it, but the town would even then become liable for accidents and repairs if no acquiescence on their part is necessary. According to the doctrine in *Woodyer* v. *Hadden*, approved in *Hobbs* v. *Lowell*, the dedication by the owner may be an instant act, provided there be sufficient evidence of intention. No notice or request would be necessary, and the town might not know of its existence or that any duty to repair has arisen, but it would be equally liable. No watchfulness could save it; if its officers watched every open piece of ground and the footsteps of every passenger, it might escape the penalty of neglect, but not the expense of repair. Except where the Statute of 1847, ch. 203 applies, it cannot close up the road nor prevent the passengers from using it; but if they are injured, it must respond in damages. "Such a doctrine," says Morton, J., "seems to me to

endanger the rights of towns, to make the location of highways depend upon private views and interests, rather than the public necessity and convenience." So much evil and injustice must follow, if highways can be so created, that only stern necessity could justify it. But how can any such necessity exist, when we have a cheap, easy and speedy way of laying out highways provided by law. The legislature have prescribed a method, in which a highway may be made — that those who desire it, may petition the county commissioners or mayor and aldermen, and those who are against it may oppose; that notice must be given to towns, that there may be a view, and all parties may be heard on the spot. Now, if a road can be made just as well without complying with these provisions, by any one in possession of land, the only advantage of the statute method is, that possession of the land may be obtained by it. Unless it were a road which nobody would use, the rest would follow; for after user, the town, to avoid liability for accidents, would be obliged to repair — that is, actually to make the road. If the towns must be notified and heard, was it not intended that, if sufficient reasons against the road were shown by them, no highway should be made; or was it only intended, that they could not be compelled to *make* it, but might *be compelled to repair it, notwithstanding their sufficient reasons*, if it was made by others, and used by the public. If the reasons showed that the road was not wanted, it would be equally unjust to compel them to repair it, as to compel them to make it. If the road were unnecessary or inconvenient, would the tribunal order it to be made against the remonstrances of the towns, if other parties offered to secure the expense of the first making of it; and was it intended by the legislature, that the hearing of the towns should be limited to objections against the first expense? Or if, under these circumstances, a road could not be made by legal proceedings, so as to compel the towns to repair, was it intended that it might be so made by the will of an individual, without any legal proceedings? It seems to us that this legislation was intended to cover the whole subject, and to provide the only compulsory way of making a highway; that any other method of making a road without such notice, hearing, and adjudication, which the towns should be compelled to repair, would not be collateral to and independent of this legislation, but directly contrary to it;

and that if any such method had existed by common law, it was repealed by the statutes. But although this may be so, there can be no need of resorting to this course, where no party is to be compelled. Where the owner dedicates, the public use and the towns accept the road, it becomes a highway by agreement; and this seems to be the only highway by dedication, which can exist in this commonwealth. There may be, without any such assent or acceptance, a common way, which persons have a right to pass over, which is not a highway, and any incumbrance on such a way may give a right of private action to individuals, although it cannot be the subject of indictment or complaint. Unless, therefore, the city have by some act adopted or acquiesced in the dedication on the part of the owner, the land in question has not become part of the highway or street.

But, if an act of dedication by the owner, and user by the public, would make a highway without the assent of the town, could this doctrine be extended to cases of limited dedication, especially to cases where the right reserved rendered the road particularly dangerous to passengers. It seems to be settled, that a dedication of a way by the owner, may be partial and limited, *Stafford* v. *Coney*, (7 Barn. & Cress. 257; 1 Camp. 263, note); *Rex* v. *Northampton*, (2 Maule & Selw. 263); Wellbeloved on Highways, 54; *Gowen* v. *Philad. Ex. Co.* (5 Watts & Serg. 141,) although it cannot be limited to part of the public. *Poole* v. *Huskinson*, (11 Meeson & Welsby, 827.) It was proved in the case on trial, that when the warehouse was built, a cellar-door with steps was made to open on the land claimed to be part of the highway; that as soon as the building was finished, the cellar was occupied by a tenant, who kept the door open, placed a bench there, and sold apples. This was the state of things at the commencement of the user by the public, which was necessary to prove the dedication. It seems, therefore, to have been a limited dedication, if any. If this limited dedication and user by the public have made this land part of the highway, and any person should fall down the cellar way and be injured, the city would be liable for damages, although they had no knowledge of such dedication; and if they had notice of this state of things, they might be liable to double damages. They could not close the cellar, if the right was reserved, (though they might enforce a by-law, which would ren-

der it less dangerous;) but even then an accident might happen, and the city might become liable for damages, without any negligence on its own part. The city could not fence in the land, if it had become a highway before 1847. (Stat. 1847, ch. 203.) If, when damages were recovered of the city, it should claim them of the tenant, he might answer, that he made no cellar-door into any then existing highway; it became a highway afterwards, and subject to his right. That the obligation of the city was incident to a highway, of which his right was wholly independent, older than the highway, originally excepted out of it, and adverse to the right of highway. He might be liable as an abutter, but not to the city. If it were replied that such a right was incompatible with a highway and could not be reserv-out of it, that would prove that there was no dedication by the owner. *Stafford* v. *Coney*, (7 Barn. & Cress. 257.)

This is one case which has occurred, and it is not difficult to conceive cases of dedication so limited, as to make a highway still more dangerous. It seems, that a city or town ought not to be subjected to liabilities in such case, without any negligence, and without any evidence of adoption of, or assent to the highway on its own part; and this by the act of an individual and user by the public, and without any hearing, consideration, or judgment by the tribunal constituted by law to determine such matters.

But it is contended by the prosecution, there is some evidence of assent on the part of the city, and that the laying down of the bricks was part of this evidence. The law provides, that they shall be laid down by the abutting owner, and in the absence of evidence, it must be presumed that this was so done. The evidence of acceptance must be some act of the city. This act of the owner is not an act of the city, the act of dedication on his part cannot be the act of adoption by the city, nor can the previous making of the thing to be excepted be the subsequent acceptance of it.

But the "paving with bricks or flat stones" must be done under the direction of, and to the approbation of the surveyors of highways. This direction and approbation is here limited to the quality of the materials and work, and can be no assent to, or acceptance of anything further.

In *Hobbs* v. *Lowell*, an omission to prosecute was held, under

the circumstances of the case, to be evidence of an acceptance. So, under other circumstances, it might be held to be evidence of non-acceptance. It is twenty-five years since the land in question has been used for the purposes before-mentioned, and the absence of any prosecution during that period seems to show that the city has never recognized it as part of the highway, although it was proved that the facts were known to the mayor and aldermen for several years since. Even if the present prosecution could be an acceptance, prosecuted as it is, without any special direction or particular authority for that purpose and which might be prosecuted by any other citizen, it would not operate as an acceptance at or before the time of the acts complained of.

Complaint dismissed.

P. W. Chandler, for the commonwealth.
C. Wm. Loring, for the defendants.

Court of Appeals of South Carolina, Law Term, January, 1849, at Charleston.

Lewis v. *Brown.* — In this case, the slave in dispute was sold and bought by Sheriff Mulligan, at his own sale, in March, 1844. The sale was entered in the sheriff's books, to Langford, in April, 1844; the slave was sold at public auction, by Mulligan, purchased by the plaintiff, and the money paid to his (Sheriff Mulligan's) book-keeper and deputy. He (the slave) remained in the plaintiff's possession until April, 1847, when he was seized as Mulligan's property, and sold by the sheriff (Goetty) to the defendant. It was held, that whether the first sale to Mulligan was utterly void or not, might be immaterial, for the sale in April, if made as sheriff, would give the purchaser a good title.

Spann and Wife v. *Perry.* — Some of the counts in the declaration were improperly joined. One of the counts was properly framed on the matter found by the verdict. It was held, that the other counts might be struck out, and the verdict retained on the good count. The motion to arrest the judgment was denied.

Sahlman v. *Mills et al.* — The defendants expecting corn in their own bags, from Col. Hampton's plantation, and the plaintiff having brought to them a sample of corn, which he said was defendants', at the railroad, (where it had not as yet arrived,) they contracted to sell him six hundred

and twenty-five bags, and gave him *a delivery order*. It was held that this was a sale, and on the defendants' refusing to deliver the corn, that the plaintiff might maintain trover. The motions for nonsuit and new trial were refused.

Mordecai v. *Bull.* — Action on a note for $155, given for forty-two dozen files. The defence was, that they were worthless. The proof clearly showed they were not merchantable. The defendant was a mechanic, and very capable of judging such articles. He had opportunities to return the files, but made no tender. They were worth about seventy-five cents per dozen, making an aggregate of about $31.50. The jury found for the defendant. A new trial was ordered, the Court holding that the plaintiff was clearly entitled to recover the actual value of the files, and might be entitled to recover the whole note.

Hibler v. *Barrett.* — The plaintiff had sold a mule to the defendant. The purchase was made by Cohen, an agent for the defendant. The plaintiff took Cohen's note. The defendant furnished Cohen with the money to pay for the mule; he did not do so. It was held, the plaintiff might recover against Barrett, and a verdict so finding was sustained.

Nowell v. *Gadsden.* — The defendant sold and warranted by deed a negro to be sound. It was held, that notwithstanding the plaintiff had opportunities of examining the negro before the purchase, and kept him from April to January, yet, on clearly showing the unsoundness, he was entitled to recover. A verdict for the plaintiff was not set aside; a new trial was refused.

Alston v. *Durant.* — Money paid unlawfully by the master of a runaway slave, to a sheriff who has him (the slave) in custody, and who will not deliver him without such payment, is not a voluntary payment, and may be recovered back. New trial refused.

Saunders v. *Graham.* — An objection to a commission, that it did not appear that the commissioners executing it were sworn, was overruled, the presumption being that they had acted regularly. In an action of assault and battery, defendant struck the plaintiff, without provocation, with his whip, and beat him severely; the jury found a verdict of $500 damages; the court refused to set it aside.

Padget v. *Drawdy et al.* — A deed conveying the land of a defendant, in a misdemeanor to avoid the payment of the fine, is fraudulent, and the verdict of a jury finding against it, will not be set aside. The motion for a new trial was refused.

State ex rel. Hunt v. *Pinckney.* — A mandamus will not lie against the tax-collector, to compel him to receive in payment of taxes on judgment issued, and by the act of 1788, directed to be received in payment of taxes.

Brisbane v. *O'Neall.* — In this case, it was held that the defendant, the owner of a river plantation below the plaintiff, and who threw the water of the swamp off, by a dam and ditch, which, when cut, was fully equal to, if not better than the natural drain, and which, in ordinary times, discharged the water of the swamp, was bound, although he neither flowed nor drained by it, to scour and keep it clean.

Cox v. *Buck.* — This was an action of trover, and verdict for the defendant on the circuit. The plaintiff claimed two slaves, Jim and Joe, which had been sold as the property of his brother Harman, by the sheriff. His claim was under the will of his father, which constituted an executory devise, by way of limitation over between the plaintiff and Harman, by the following words: and "if either of my two sons should die without lawful issue, that my other son shall have his part of the property." In the life of Harman, the sheriff seized and sold Jim and Joe, which was of Harman's part of the negroes of his father. The plaintiff was at the sale, but did or said nothing which was then communicated to the defendant. Buck bought Joe; Jim was bought by Kennedy, who did not comply; he was sold next day, and bought by the plaintiff. At his request, the defendant took his bid. He then said he would relinquish all claim on the boys or boy. On sale day he had endeavored to induce persons other than the defendant to bid. It did not appear he knew his rights. Harman died without issue. It was conceded by plaintiff's counsel, he could not recover Jim, but as to Joe, the court held, that unless the plaintiff, with full knowledge of his rights, had, by word or deed, induced the defendant to buy him, that he would not be concluded from recovering him. A new trial was ordered.

Lee for Caldwell v. *Morse.* — The plaintiff had recovered the whole amount of an account, including several items from June to October, 1845, with interest on the balance from 15th October, on proof that the account was admitted in June, 1845. It was held that there could be no proof of subsequent items, and that interest could not be found *eo nomine* on an account. A new trial was ordered, unless the plaintiff release on the verdict so much as covers his account charged between June and October, and the interest.

Carr v. *Waugh.* — An insolvent debtor entering special bail, and dissolving one of three attachments against him, and thus enabling two to be paid, is not guilty of such a fraudulent preference which *per se* deprives him of the benefit of the prison-bounds act. If this be done more than three months before he is surrendered by his bail, it is no objection to his discharge.

O'Neall v. *McBride.* — The legal title in a slave, conveyed by B to A, on a parol understanding, that on the repayment of the purchase-money, the slave was to be restored to B, is in A. So, too, the legal title is in A, notwithstanding the money which was paid on the purchase belonged to C, for whom A acted as agent. Motion for new trial refused.

McKenzie et al. v. *Elfe, City Sheriff.* — A slave was sold and delivered by M. to R., who paid the purchase-money. No bill of sale was executed, and the understanding was, that the title should remain in M. until other debts were paid by R. It was ruled, that this was a mere parol mortgage, and could not be sustained. The slave was held to be liable to an execution creditor before the sale by M. to R.

Ravenel v. *Gambati.* — The defendant sold and warranted a slave to be sound. The plaintiff had had the slave on trial for two months. In a week after the purchase, he was found to be lame; the great bone of the

toe was found to be affected, and with the toe was removed. The physicians concurred in saying that the disease existed before the sale. The jury, properly instructed by the recorder, found for the defendant. The court ordered a new trial.

City Council v. *Hollenback.* — The ordinance of the city council subjects to a penalty, to be recovered by action, any one who shall retail intoxicating drink without a license. The defendant keeps a shop called "*The Shades*," beneath the theatre. He sold "*by the small*" without a license, and for this violation the action was brought. He defended himself on the ground that he had applied for a license, and that the council had refused to him a license, on the grounds that the place was an improper one, and that a homicide had been committed there. The jury found for the defendant. The court *unanimously* ordered a new trial.

Bank of St. Mary's v. *Calder et al.* — The defendants were the sureties of V., the cashier or agent of the bank in Savannah. He permittted a customer to overdraw; and notwithstanding a bill of exchange drawn by the customer, more than enough to cover the overdrafts, was afterwards negotiated on a house in New York, which was claimed and presented by B., the agent of W., the owner of the bank, but not accepted; and notwithstanding the customer was sued for money had and received, and judgment recovered in the name of the bank, yet it was held, after the verdict of the jury against the defendants, these could not be set up as ratifications of the over-drafts allowed by the cashier. The motion for new trial was refused.

State ex rel. Tait et al. v. *Elfe, city sheriff.* — Houses built on leased land are not liable to be taxed under the city ordinance of 1844. Income liable to be taxed, is that of the preceding, and not of the current year. Prohibition ordered.

Otis et al. v. *Dickson et al.* — A confession of judgment signed in the name of one of the defendants, under a power of attorney, is void, and any one who is a creditor or the agent of the creditors, under a subsequently executed deed of assignment, may move to set aside the judgment entered up.

Rowand v. *Bellinger et al.* — In this case, counts for harboring a slave were joined with a count in trover. The only proof was, that which established a conversion. The jury, under the instruction of the judge below, found a sum much beyond the hire and value, under the counts of harboring and the count in trover. The verdict was held to be wrong. The same evidence cannot make two causes of action for which the plaintiff is entitled to recover damages in case.

Lloyd v. *Barden et al.* — The defendants, owners of a steamboat, had been in the habit of carrying packages of money for the plaintiff, without hire. L. & Co. were the agents of the boat in her regular business of carrying for hire. L. was their clerk, and received packages for the boat. As the boat was leaving the wharf, the plaintiff's clerk handed to L., the clerk of L. & Co., a package, which he said he told him was money, but which L. denied. L. threw the package on the deck of the steamboat, which the clerk of the P. swore the Captain (Barden) picked

up. The jury found for the plaintiff. The court refused to set the verdict aside, holding that the delivery to L., if authorized to receive the plaintiff's packages for the boat, was enough to charge the defendants.

Commissioners of New Town Cut v. *Seabrook.* — It was held that the commissioners had the right to issue an execution or executions for the fines imposed by them, though exceeding twenty dollars, directed to all and singular the sheriffs of the state, and that the sheriff of a district beyond their local jurisdiction, was bound to execute it. See the acts of 1788, 1807, and 1825. The decision below was reversed.

Ryan v. *Clanton.* — The defendant, the mortgagee of a chattel in Georgia, under an unrecorded mortgage, which, by the law of Georgia, constitutes only an incumbrance, pursued the slave to Charleston, and found him in the possession of the plaintiff, who had bought him without notice, and paid a full price for him. He seized him and carried him back to Georgia, where he foreclosed his mortgage. It was held that the plaintiff was entitled to recover. The motion for new trial was dismissed.

Johnson v. *Hannahan et al.* — The defendants, for the purpose of opening a line ditch, entered within the enclosure of the plaintiff, which occupied a bank on which a common fence had stood, for more than twenty years, and hence held to be trespassers. If the party in opening it threw dirt on the plaintiff's side, it would be a trespass. These technical trespasses were followed by an invasion of the plaintiff's house, by one of the defendants, J. H. The other defendant entered merely upon the plaintiff's land. It was held, that the judge did right in refusing to submit the case of J. J. H. to the jury, before the whole case was tried. A joint verdict for $3000 damages was found for the plaintiff, which the court refused to set aside. The motion for new trial was dismissed.

Fleming v. *Close.* — In this case, which was an application to be discharged, under the prison-bounds act, it was held that counts alleging a mere fraud in obtaining goods for the defendants own use and for which the debt was contracted, were properly struck out as constituting no reason why the defendant should not be discharged. Under the act, it was held, that the defendant might be examined, on oath, not only before the judge, when he applied for his discharge, but also upon the trial of the issue. A new trial was ordered.

Legare et al. v. *Frazer.* — The statute of limitations will not prevent factors from recovering from their principal, money which was recovered from them on the sale of his cotton fraudulently packed, made more than four years before action, they being sued before the statute could run in their favor. The statute did not begin to run against them, until they paid the money for the defendant. A counsel fee paid by them, may be recovered from the defendant, he having had notice of the previous suit, and failing to defend it, and the plaintiff's defence being beneficial to the defendant.

Syme v. *Saunders et al.* — A tenant may show that the title of his landlord is determined. Without proof of adverse possession, for at least the statutory period, the heir of one, who entered *pur autur vie*, and who by the paper title, had no interest in the land, cannot have a verdict against

an actual possession of twenty-four years, although he may have shown a promise to pay rent more than twenty years ago. The motion for a new trial was granted.

Haselden v. *Whitesides, administrator.* — The defendant's intestate, in 1838, made the notes the subject of this action; he died in 1841. Three days before his death he admitted he owed the debt; in 1844, the defendant married the widow, and said he wished to keep the land, and if the plaintiff would give him a chance, he would pay the debt out of his own pocket. The land was his wife's inheritance. Defendant administered in July, 1846; this action was then brought. Held, (1,) that the debt was barred by the statute of limitations. (2.) That the defendant was not personally liable, the promise being verbal. (3.) Even if liable, there could be no recovery against him on a personal contract in an action against him as administrator.

Parkerson v. *Wightman.* — If a bailiff be directed to make a distress in a particular way, and he distrains differently, still the bailiff is liable for his acts *in case*. The words "*if a mechanic the tools of his trade*," used in the act of 1823, will not only embrace the usual and proper tools of his *trade*, but also of "*kindred trades*." A verdict finding $299.35, the whole value of the tools distrained, was held to be right, and that the rent arrear should not be deducted therefrom. The motion for a new trial was dismissed. (O'Neall, J. and Withers, J. dissented.)

Farrell, assignee v. *Paine.* — The assignee of an insolvent debtor, under a deed of assignment, may sue on a note embraced in the deed, without joining the agent appointed by the creditors under the act of the legislature.

Cassidy v. *Varni.* — The defendant, in building an additional story, racked his wall in such a way as to cover some 14 inches which separated plaintiff's house from his, and placed his wall upon the house of the plaintiff. The plaintiff sued him for this trespass; the case was compromised, and he paid $30 dollars for the damage, and $10 cost, and thereupon the plaintiff discontinued her case, the defendant agreeing in writing that, after notice, he would take down his wall and have gutters fixed to prevent leaking. He did not perform this contract. The plaintiff sustained injury by leakage. Some evidence of notice was given. The defendant sold his house and lot. The plaintiff sued. It was held that the defendant, notwithstanding his sale, was liable. The case was properly left to the jury; they found a verdict of $275, which was sufficient to cover the plaintiff's damages, and also to pull down and rebuild the defendant's wall, so as to relieve the plaintiff's wall from the same. The motion for a new trial was dismissed.

Court of Errors, January Term, 1849, *at Charleston.*

Alexander, Harbor-Master of Charleston, v. *The Wilmington and Raleigh R. R. Co.* — The ordinance of the city of Charleston, of 17th May, 1841, which imposes one per cent. per ton on the steam-packets of the defendants, to be paid to the harbor-master, is unconstitutional, as impos-

ing a tonnage duty, which, by the 2d part of the 10th section of the 1st article of the constitution of the United States, is prohibited to the states, without the consent of congress.

Verdier v. *Hyrne, Jr.* — The wife of the defendant, with nine other persons, were entitled in remainder, under the will of Peter Sinkler, deceased, to forty-two slaves. This right was matter of contest, and was adjudged by the chancellor on circuit, and carried to the court of appeals. Pending that appeal, the wife of the defendant died, and he (the defendant) then sold to the plaintiff his interest. The appeal was afterwards dismissed. The defendant administered on his wife's estate, and without the proceeding being amended, the writ of partition issued, and directed, *inter alia*, Mrs. Hyrne's share to be delivered to her husband, as administrator. Two slaves were set apart as her share, and the return confirmed. The defendant sold them, as administrator, for partition, notwithstanding they were claimed by the plaintiff. He brought trover, and contended the marital rights of the husband had attached before the sale to him, and therefore he was entitled to the whole proceeds of sale, instead of one moiety the husband's share, as distributee, which he was willing to pay. It was held, the marital rights of the husband had not attached to the property before the sale to the plaintiff, inasmuch as there was no reduction into possession by the husband in the lifetime of the wife. Motion for new trial granted, unless the plaintiff releases one half of the verdict.

Notices of New Books.

A Law Dictionary, adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union; with References to the Civil and other Systems of Foreign Law. By John Bouvier. Ignorantis terminis ignoratur et ars.—*Co. Litt.* 2, a. Je sais que chaque science et chaque art a ses termes propres, inconnu an commun des hommes.—*Fleury.* Third edition, much improved and enlarged. 2 vols. Philadelphia: T. & J. W. Johnson, Law Booksellers. 1848.

We are happy to announce a third edition of this valuable work, very much enlarged. More than twelve hundred new articles have been added to those contained in former editions, and many of the latter have been entirely remoulded. Besides these improvements, a very copious Index has been added, which will greatly assist the student. A glance at this Index will exhibit the great number of subjects treated of in these

volumes. This index, which is certainly compressed as much as an index can be, occupies seventy-eight octavo pages, printed in double columns.

It is sometimes the fashion to decry Law Dictionaries. It would be about as well to decry Dictionaries of the English language. There is undoubtedly a period in professional life, after which recourse would rarely be had to such works for information; but to say that a beginner can get along without one, is quite as erroneous as to suppose that a Yankee could find his way about London without a pocket-map. Even the list of Abbreviations in Bouvier's Dictionary is of great value to all law students, who have no friends to ask questions of. How else could a student learn what *ff* stood for.

In conclusion, we can only hope that the work will find a ready and extensive sale.

Trial of William Dandridge Epes, for the Murder of Francis Adolphus Muir, Dinwiddie County, Virginia. Petersburg, Va.: J. M. H. Burnett, Reporter, 1849.

The Trial of Epes, and the extraordinary murder of which he was convicted, have excited unusual interest throughout the country. We hope to give some sketch of the case, when we find room, as well as of the able arguments of the counsel.

Miscellaneous Intelligence.

The Alien Case. After the first form of the present number was set up, we obtained a much fuller abstract of Mr. Justice Wayne's opinion, which we publish below.

"1. That the acts of New York and Massachusetts, imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those states, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void; being in their nature regulations of commerce contrary to the grant in the constitution to congress to regulate commerce with foreign nations and among the states.

"2. That the states of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

"3. That the congress of the United States having, by sundry acts passed at different times, admitted foreigners into the United States, with

their personal luggage and tools of trade, free from all duty or impost, the acts of Massachusetts and New York, imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is in transitu to her port of destination, although said vessel may have arrived within the jurisdictional limits of either of the states of Massachusetts or New York, and before the passengers have been landed, are in violation of said acts of congress, and therefore unconstitutional and void.

"4. That the acts of Massachusetts and New York, in so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same arriving in the ports of the United States within the said states, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States or coming from a port in the United States, are unconstitutional and void, being contrary to the constitutional grant to congress to regulate commerce with foreign nations and among the states, and to the legislation of congress under the said grant or power by which the United States have been laid off into collection districts, with ports of entry established within the same, and prescribing the commercial regulations under which vessels, their cargoes, and passengers, are to be admitted into the ports of the United States, as well from abroad, as from other ports of the United States.

"That the act of New York now in question, in so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void.

"That the 9th section of the first article of the constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subject of importation and commerce.

"5. That the 6th clause of the 9th section of the first article of the constitution, prohibiting any 'preference from being given by any regulation of commerce or revenue to the ports of one state over those of another state, and that vessels bound to or from one state shall not be obliged to enter, clear, or pay duties in another,' is a limitation upon the power of congress to regulate commerce for the purpose of producing entire commercial uniformity within the United States, and also a prohibition upon the states to destroy such uniformity by any legislation prescribing a condition upon which vessels bound from one state shall enter the port of another state.

"6. That the tax imposed upon passengers by the acts in Massachusetts and New York are unconstitutional and void, because each of them conflicts with so much of the first clause of the 8th section of the first article of the constitution as enjoins that all duties, imposts, and excises, shall be uniform throughout the United States; because the constitutional uniformity enjoined is as real and obligatory upon the states in the absence of all legislation by congress, as if the uniformity had been made by the legislation of congress; and that such constitutional uniformity is interfered with and destroyed by any state imposing any tax upon the inter-

course of persons from state to state, or from foreign countries to the United States.

"7. That the power in congress to regulate commerce with foreign nations and among the states, includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a state, in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

"8. That the states of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound; and that the states may, in the exercise of such police power, without any violation of the power in congress to regulate commerce, exact from the owner or consignee of a quarantine vessel, and from passengers on board of her, such fees as will pay to the state the cost of their detention, and of the purification of the vessel, cargo, and apparel of the persons on board."

Obituary Notice.

At his residence in Woodstock, Vt., January 11th, Hon. Charles Marsh, LL.D., aged 83. He was born in Lebanon, Conn., July 10, 1765 — removed with his father's family to Vermont at the age of nine years — graduated at Dartmouth College in 1786 — and received his professional education under Tappan Reeve, at Litchfield, Conn. He settled at Woodstock in 1789, where he resided during his life.

As a lawyer, he was, during a long career, the acknowledged head of the Vermont Bar, sustaining to the judicature and jurisprudence of that state, much the same relation as his kindred in blood and ability, Jeremiah Mason, did, to that of New Hampshire.

He was District Attorney under Presidents Washington and John Adams — and was Representative in Congress in 1814 and 1815. He was always averse to holding elective offices, and in this instance, was forced into Congress against his will.

He was not more distinguished as a Lawyer, than as a Christian, a philanthropist, a patriot, and a dignified and thorough gentleman of the Revolutionary school.

He was among the earliest and most efficient members of the Colonization society — the American Board of Commissioners — the Bible and Domestic Missionary Societies. He was trustee of Dartmouth College from 1809 to his death, and to him, in that office more than to any other one, is owing the successful result of the controversy which gave to American Jurisprudence the famous Dartmouth College case, reported in the fourth of Wheaton.

B.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Additon, Zelotis R.	Abington,	Jan. 9,	Welcome Young.
Alden, Joseph W	Cambridge,	" 22,	Asa F. Lawrence.
Allen, Samuel W.	Boston,	" 25,	J. M. Williams.
Andrews, Hezekiah P.	Danvers,	" 16,	John G. King.
Batchelder, James H.	Danvers,	" 26,	John G. King.
Bemis, Nathaniel O.	Cummington,	" 9,	Myron Lawrence.
Burbeck, William H.	Marblehead,	" 26,	John G. King.
Burnham, Gilman, et al.	Boston,	" 25,	J. M. Williams.
Crease, William W.	Boston,	Feb. 2,	J. M. Williams.
Curtis, Charles G.	Chicopee,	Jan. 24,	George B. Morris.
Damon, Joseph,	Oakham,	" 9,	Henry Chapin.
Dickinson, Harvey,	Boston,	Feb. 9,	J. M. Williams.
Ellsworth, George W.	Medford,	Jan. 13,	Asa F. Lawrence.
Filton, Abraham,	Roxbury,	" 1,	Francis Hilliard.
Folsom, Peter,	Boston,	Feb. 2,	J. M. Williams.
Goddard, Elias W.	Boston,	" 2,	J. M. Williams.
Goddard, W. W.	Boston,	" 5,	J. M. Williams.
Harding, Charles L., et al.	Oxford,	Jan. 30,	Henry Chapin.
Heath, Dana,	Boston,	Feb. 15,	J. M. Williams.
Holbrook, John G.	Roxbury,	Jan. 1,	Francis Hilliard.
Holton, Josiah C.	Springfield,	" 11,	George B. Morris.
Hosford, William H.	Stockbridge,	Feb. 3,	Thomas Robinson.
Kelley, Joseph,	Charlestown,	Jan. 24,	Asa F. Lawrence.
Loan, Patrick,	Somerville,	" 22,	Asa F. Lawrence.
Lufkin, Joseph,	Dracut,	" 10,	Asa F. Lawrence.
Moore, Joel, Jr.	Attleborough,	" 25,	David Perkins.
Morse, Chester F.	Foxborough,	" 26,	Francis Hilliard.
Nims, N. E., et al.	Boston,	" 26,	J. M. Williams.
Paige, David, et al.	Boston,	" 23,	J. M. Williams.
Patch, Sidney,	Boston,	Feb. 8,	J. M. Williams.
Plummer, John, et al.	Methuen,	Jan. 8,	John G. King.
Pote, Elisha,	Lynn,	" 13,	John G.King
Price, Charles E.	Worcester,	" 11,	Henry Chapin.
Richardson, J. H.	Boston,	" 25,	J. M. Williams.
Sanderson, Ivory,	Leominster,	" 13,	Henry Chapin.
Sheridan, Bernard,	Boston,	Feb. 9,	J. M. Williams.
Sherman, William,	Northborough,	Jan. 20,	Henry Chapin.
Smith, William,	East Bridgewater,	" 7,	Welcome Young.
Stanton, Amos C.	Attleborough,	" 25,	David Perkins.
Stanton, Samuel G.	Attleborough,	" 25,	David Perkins.
Stevens, Grenville,	Boston,	" 29,	J. M. Williams.
Stuart, Arthur,	Boston,	Feb. 8,	J. M. Williams.
Swete, John,	Lowell,	Jan. 30,	Asa F. Lawrence.
Viles, William A.	Charlestown,	" 11,	Asa F. Lawrence.
Warring, Henry,	Webster,	" 8,	Henry Chapin.
Wates, William W.	Springfield,	" 22,	George B. Morris.
White, James L.	New Bedford,	" 17,	David Perkins.
Whittier, George,	Danvers,	" 27,	John G. King.
Whitmore, P. D.	Great Barrington,	Feb. 2,	Thomas Robinson.
Wight, William L.	Boston,	Jan. 23,	J. M. Williams.
Wingate, Moses, et al.	Methuen,	" 8,	John G. King.